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# A Primer on the Patterns of Louisiana Workplace Torts

Thomas C. Galligan, Jr.\*

## I. INTRODUCTION

Every year as I discuss workplace torts with my first year tort students, they look up at me<sup>1</sup> curiously. Finally, one hand rises slowly in the air. It moves up with the confidence of a Southerner driving on ice. "Professor," the student says diplomatically, "has anyone written something on this?" The real message behind the question is clear: "Professor, we don't get a word of what you're telling us; is it written down somewhere in one place so we can have a chance at understanding it?" The sad answer to the question is no. Parts of what we need to know about Louisiana workplace torts are written on extensively and very well. But nowhere is there a functional description of what one needs to know to understand common workplace tort cases. Nowhere is there a relational discussion of the confusing issues involved or the myriad relationships out of which those issues arise. Consequently, after speaking to the Louisiana Judicial College on this subject, I sat down to write. I write in the spirit of helping my students. I write in the hope that, if this is written down somewhere, law students may understand the subject better, remember it better, and even be more critical of what I describe herein.

Worksite torts are some of the most common and fruitful areas of tort litigation in Louisiana. In handling these cases, it is crucial to understand the various relationships among the parties involved. Thus, one must always be cognizant of who is suing whom for what. Who is an employee? Who is a borrowed servant? Who is a statutory employer? As such, I will analyze the workplace tort claims I discuss in a lawsuit format, i.e., A v. B. In so doing, A's relationship to B is *always* critical. In trying to make my simple points, I will use the basic facts of *Benoit v. Hunt Tool Co.*<sup>2</sup> to develop several hypotheticals and to discuss the legal issues raised.

Let me set forth the basic fact pattern. Suppose Guillory works as a welder for the Hunt Tool Company (Hunt). Assume further that Morris & Meredith (M&M) is an oil drilling company that is overhauling a rig. M&M needs a welder and welding equipment that it does not have. Consequently, M&M asks Hunt to send over a welder and some equipment; Hunt sends Guillory. Unfortunately, while Guillory is welding on a partially filled fuel tank, it explodes. In the following section, I will spin off various hypotheticals to deal with some typical worksite tort issues.

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1. They look up at me because I am standing and they are sitting.

2. 219 La. 380, 53 So. 2d 137 (1951).

## II. THE WORKPLACE TORT

A. *The Stranger—Hector*

Assuming the facts set forth in the final paragraph of the Introduction, let us now suppose Hector was injured in the explosion Guillory negligently caused. At the time of the explosion, Hector was walking by the M&M worksite. Hector is an employee of neither M&M nor Hunt; he is a stranger to the job. Hector is straight out of Camus.<sup>3</sup>

1. *Hector v. Guillory—Plain Old Tort Duties*

Assuming Guillory was negligent in welding around a flammable substance, from whom might Hector recover? Logically, Hector might first seek recovery from Guillory himself. Assuming Guillory had a duty to exercise reasonable care while working to protect those who might suffer foreseeable injury from unreasonable welding, Guillory would probably be liable to Hector. Based upon these facts, it is apparent that a welder should reasonably foresee that welding near a flammable substance might cause personal injury to one walking nearby. Thus, let us assume, without getting into the technical details, that Guillory would be personally liable to Hector.<sup>4</sup>

2. *Hector v. Hunt*a. *Independent Negligence*

Assuming Guillory was negligent in his welding, can Hector recover from anyone else? Hector would, no doubt, like to recover from Hunt. If Hunt was somehow negligent in hiring Guillory or in sending him to do this job, then Hunt would be independently at fault pursuant to Louisiana Civil Code articles 2315 and 2316.<sup>5</sup> Consequently, if Guillory's negligent welding was a risk within the scope of Hunt's duty to act reasonably, which Hunt breached, and if that breach was a cause in fact of Hector's injuries, Hector could recover from Hunt.

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3. See generally Albert Camus, *The Stranger* (Stuart Gilbert trans., Knopf 1978) (1942). What good is reading anything if you can't use it in a footnote? See also Homer, *The Iliad* (A.T. Murray trans., Harvard University Press 1978).

4. As to the personal liability of an agent, see generally *Canter v. Koehring Co.*, 283 So. 2d 716, 721 (La. 1973).

5. Hunt might also be strictly liable under La. Civ. Code art. 2317 if its welding equipment was unreasonably dangerous or it might be absolutely liable if the work was an ultrahazardous activity.

*b. Vicarious Liability*

However, in workplace tort cases like this, it is more common that Hunt is *not* independently at fault. More commonly, employers like Hunt are vicariously liable for Guillory's torts pursuant to Louisiana Civil Code article 2320. This is what is known at common law as *respondeat superior*. To translate: "let the master answer." *Respondeat superior* is the most common area for vicarious liability. The vicariously liable master is liable for the tort of the servant. As a matter of policy, the law holds the master responsible for the servant's tort. Some might say the master is imputed with the servant's fault. Others might say the master is being held strictly liable. However, there is a critical difference between vicarious liability and strict liability. In the normal vicarious liability case, the employee *is* negligent or *has* committed an intentional tort. That is, in a vicarious liability case there *is* a real, old-fashioned tort to pass upstream to the master. True, the master is *not* at fault, but the employee *is* at fault. In a strict liability case no one need be negligent or have committed an intentional tort if some thing (or person) for which (whom) the defendant is responsible presents an unreasonable risk of harm.<sup>6</sup>

In order to impose vicarious liability on an employer for an employee's torts, the plaintiff must establish two things. First, the plaintiff must prove the employer and the employee have a master/servant relationship rather than a mere principal/agent relationship. The key factor in determining whether or not there is a master/servant relationship, rather than a mere principal/agent relationship, is the master's right to exercise control over the servant's work.<sup>7</sup> Here, assuming Hunt had the right to and did exercise control over the details of Guillory's work while at M&M, there would be a master/servant relationship.

Second, to impose vicarious liability the plaintiff must show that the employee, Guillory, was in the course and scope of his employment with Hunt when he committed the tort.<sup>8</sup> Determining the course and scope of one's employment is intensely fact specific; it must be done on a case-by-case basis. It is typically decided, as a matter of fact, by the jury or trial judge, as fact finder. Perhaps, the course and scope determination is, in actuality, like a duty/risk inquiry. Should we hold this master liable for this tort committed by this employee under these circumstances? In deciding the course and scope question, the fact finder considers all the relevant policies (and emotions) at stake in the particular case, and in the general setting as well. In summation, if there is a master/servant relationship between Guillory and Hunt *and* if at the time of the tort Guillory was in the course and scope of his employment, then Hunt would be vicariously liable to Hector for Guillory's tort.

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6. See Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 La. L. Rev. 323 (1992).

7. See *Blanchard v. Ogima*, 253 La. 34, 215 So. 2d 902 (1968).

8. See *Reed v. House of Decor, Inc.*, 468 So. 2d 1159 (La. 1985).

Now would be an appropriate time for a slight diversion. We know, for purposes of the hornbook, that a master may be liable for either the negligence<sup>9</sup> of its employee or its employee's intentional tort,<sup>10</sup> assuming of course the servant is in the course and scope of employment at the time of the tort. One might reasonably conclude that the course and scope of employment has a somewhat broader scope in a negligence case than in an intentional tort case. The Louisiana Supreme Court has indicated that, when deciding whether an employer's intentional tort is in the course and scope of employment, a court should look at the particular conduct involved. Alternatively, when deciding whether a servant's negligent act is in the course and scope of employment, a court should look at the employee's general activities at the time of the tort.<sup>11</sup>

On a related front, we know that as the servant climbs higher up the master's chain of authority, course and scope of employment broadens.<sup>12</sup> Thus, in one Louisiana case, an employer was vicariously liable for an attempted murder where the defendant's president hatched the plot in order to collect insurance proceeds.<sup>13</sup> In still another case, the Louisiana Supreme Court held that a small corporation was vicariously liable when its president and CEO negligently shot someone while at a camp building duck blinds on the weekend.<sup>14</sup>

### 3. *Why Vicarious Liability?*

Broadening the inquiry, why do we have vicarious liability at all? What's the reason for it? The best way to check out any tort doctrine is to run it through the various purposes of tort law.

#### *a. Deterrence, Administrative Convenience, and Enterprise Liability*

Tort law is designed, in part, through the imposition of money judgments, to encourage people to behave reasonably, i.e., to behave in a reasonably safe manner.<sup>15</sup> From an economic perspective, tort law should encourage efficient investments in safety.<sup>16</sup> In that regard, perhaps the imposition of vicarious liability encourages efficient investments in safety. But what are we trying to deter? If we are trying to deter unreasonable hiring or supervision by employers, then why do we not just hold the employer liable for his or her *own* fault? In this regard, Hunt would be liable for negligently hiring or supervising Guillory,

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9. See, e.g., *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467 (La. 1990).

10. See, e.g., *LeBrane v. Lewis*, 292 So. 2d 216 (La. 1974).

11. *Ermert*, 559 So. 2d at 478.

12. *Id.* See also *Miller v. Keating*, 349 So. 2d 265 (La. 1977).

13. *Miller v. Keating*, 349 So. 2d 265 (La. 1977).

14. *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467 (La. 1990).

15. See generally Guido Calabresi, *The Costs of Accidents* 135-235 (1990).

16. See, e.g., Steven Shavell, *Economic Analysis of Accident Law* 5-46 (1987).

*but* that is Hunt's tort, *not* Guillory's tort. In a vicarious liability case, we are *not* saying Hunt is negligent *because* Guillory is negligent. We are saying Hunt is vicariously liable *because* Guillory is negligent.

Of course, maybe what the law is saying with vicarious liability is that Hunt *really is* at fault. That is, vicarious liability may just be based on the conclusion that, usually, when employees cause injury, employers *are* at fault. Put differently, in most cases, when employees commit torts, employers have failed to properly hire, train, equip, or supervise. Additionally, courts may believe that despite this assumed truism of employer fault, it is too difficult for injured victims, like Hector, to prove the employer's fault. So, the law conclusively presumes employer fault and, by so doing, encourages masters to be safer in the future. Ask yourselves: can it really be true that wherever a servant is at fault so *is* the master? My intuition tells me masters are not at fault whenever servants are at fault.<sup>17</sup> And if they are not, then should not the presumption of fault, upon which vicarious liability *might* be based, be rebuttable? Otherwise, are we not encouraging masters to over-invest in safety? That is, are we not over-deterring.

Maybe the supposed presumption of master fault is irrebuttable because society has decided that when the employee commits a tort, the employer is at fault often enough to administratively justify making the presumption conclusive. If so, it is more efficient to hold a few non-blameworthy employers liable, because to sort out which employers are at fault and which are not would cost too much. As nice as what I just wrote might sound, we do not read about such presumptions in the cases. And, it would seem, the idea of an irrebuttable presumption is based on assumptions about master fault which could be, but have not been, tested empirically.

While one does not read about irrebuttable presumptions of fault, one has heard and does read about enterprise liability.<sup>18</sup> In the vicarious liability context, I think enterprise liability means that the enterprise should be liable for those losses it causes.<sup>19</sup> The enterprise should be liable for those injuries associated with its activities, or for that conduct which somehow benefits the enterprise. But, which injuries and conduct are these? Those that benefit the enterprise. Well, if that is the case—and I believe it is—the notion of enterprise liability in the vicarious liability setting is not very helpful: it is tautological. Why do we have vicarious liability? Notions of enterprise liability. What is that? Holding an enterprise liable for those things that are part of the enterprise. What are those? What courts say they are. Why do they say so? Because those activities are part of the enterprise. Ugh!

Even assuming we break out of this circle, enterprise liability is not helpful to explain the deterrent function of vicarious liability. If the notion of enterprise

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17. Those who know me will tell you my intuition more often leans toward recovery than against.

18. See, e.g., George L. Priest, *The Inevitability of Tort Reform*, 26 Val. U. L. Rev. 701 (1992).

19. Believe me I realize how wishy-washy I am being.

liability is to force the enterprise to take account of the costs of all its activities in setting prices for its goods or services, we should force it to pay *all* the costs of its activities. This is part of the enterprise liability justification for strict product liability. However, with vicarious liability, we *only* impose liability on the enterprise for the *torts* of its employees or servants. If we are serious about enterprise liability as a deterrent in the economic sense, then we should not stop imposing liability where the tort stops. We should impose vicarious liability for *any* injury-causing servant conduct "associated" with the enterprise. But, the law does not do that.

Moreover, if we are serious about imposing vicarious liability on the enterprise, the enterprise *should be* liable for injuries caused by mere agents and/or independent contractors, *not* just torts caused by servants. Interestingly, we see this notion of enterprise liability in ultrahazardous/abnormally dangerous activity cases.<sup>20</sup> Therein, the principal (enterprise) *is* liable for the activities of the agent and/or independent contractor. But that is *not* normally the case.

People *might* use enterprise liability to mean something else. It might mean corporate liability. A corporation can *only* act through its agents or servants. Thus, the acts of the agent or servant are the acts of the corporation, the enterprise. But if that is the case, then *vicarious liability*, in the sense I have used the term, is irrelevant. With vicarious liability, one person (the master) is liable for the conduct (tort) of another. However, in the corporate context, the act of the servant *is* the act of the corporation. Thus, when the servant commits a tort, *so* does the corporation. The corporation is *an* actual tortfeasor. This arguably makes vicarious liability, in the sense of imputed fault, unnecessary or cumulative, if not totally irrelevant.

To sum up a long story, I think the returns on the deterrence function of vicarious liability are mixed. If the idea is to deter the master's faulty conduct, why hold the master vicariously liable when he is not at fault? If the idea is to hold the master liable for all conduct associated with his enterprise, why stop at torts and why stop at servants? Finally, in the corporate context, why do we need the idea of vicarious liability at all if the servant's acts *are* the master's acts?

#### *b. Compensation and Risk Spreading*

Let us turn to the compensation argument. Perhaps vicarious liability is based on the hope that heightened liability will lead to more and better compensation for injured victims. But, if better compensation is the goal, why stop at torts? Why not make the master liable any time a servant (or an agent) injures someone? That would lead to even better compensation.

Of course, compensation leads us right into risk spreading. Maybe we impose vicarious liability on the master because he is generally a better risk

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20. See *infra* notes 48-53 and accompanying text.

spreader than the victim. But certainly that is *not* always the case. If risk spreading was our concern, we would look at who could more cheaply insure or spread risk, *not* at servant torts and course and scope of employment. Moreover, the master is generally a better risk spreader than the servant. Risk spreading concerns would indicate that we should let the employer off the liability hook, *but* that is not what our law does.

*c. Morality, Fairness, Benefit, and Punishment*

What about notions of fairness, or morality, to justify vicarious liability? I am no philosopher but, to me, morality too provides mixed returns. On one hand, it seems fair that the employer, or enterprise, pays for the injuries its employees cause which do, or may, benefit the corporation. But, under this logic, it also seems fair for the employer to pay whether there is an employee tort or not, if there is benefit or the potential for benefit. On the other hand, some may think it is not fair for the employer to pay because *another* has committed a tort. The employer did not do anything wrong, but he has to pay. Once again, there is no easy answer. One would think we were talking about balancing competing interests and philosophies in a complex, post-modern society.

Let us stick with the benefit idea for a moment. Some use it to justify vicarious liability. It makes some visceral sense. If the employer benefits, or might benefit, from the employee's conduct, it is right to also impose detriment, i.e., cost or liability. But, in fact, in many vicarious liability cases, it is hard to see any benefit at all. Additionally, benefit is another very malleable word. Potential for benefit is more flexible. Finally, if benefit, or the potential therefore, is key, why stop at employee torts?

Moving (and not very far) from morality to punishment, it seems wrong to punish one if he has done no wrong. Alternatively, if by punishment we mean deterrence, then we have already been on that inconclusive ride. Punishment does raise the specter of vicarious liability for punitive damages. But, I have written about that elsewhere<sup>21</sup> and do not intend to repeat what I thought were particularly persuasive justifications for holding the employer vicariously liable for punitive damages whenever it is vicariously liable for the employee's torts.

*d. Legislative Will, Precedent, and Comparisons to Strict Liability*

Some say tort law tries to accomplish its goals while being cognizant of the administrative cost of alternative rules and with an eye on legislative will, history, and precedent. I have already considered administrative convenience while discussing deterrence. As for legislative will, one would hope that would

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21. Thomas C. Galligan, Jr., *Augmented Awards: Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3 (1990).



be of paramount concern in a civil law jurisdiction like Louisiana.<sup>22</sup> Louisiana Civil Code article 2320 provides:

Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the master and employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

The master is answerable for the offenses and *quasi*-offenses committed by his servants, according to the rules which are explained under the title: *Of quasi-contracts, and of offenses and quasi-offenses*.

This article is broadly phrased. The courts have had to define the broad phrase "in the furtherance of." Louisiana courts have done so in much the same manner as American common-law courts have handled respondeat superior cases. Moreover, ironically, Louisiana courts have ignored the third paragraph of Article 2320. The master does not have to be able to prevent the damage before being held liable.<sup>23</sup> Otherwise, recovery under Article 2320 would require proof of master negligence, and it does not.

Let us then look at history and precedent—even in Louisiana. Article 2320 is in a group of sections of Louisiana Civil Code articles 2317-2322 that the Louisiana Supreme Court has interpreted as imposing strict liability.<sup>24</sup> In Louisiana, the only difference between strict liability and negligence is that, in a strict liability case, the plaintiff does not have to prove the defendant knew or should have known the thing, or person, involved posed an unreasonable risk of harm.<sup>25</sup> The owner or custodian is irrebuttably presumed to have knowledge of the risk. Thus, the owner of a car with defective (unreasonably dangerous) brakes is presumed to know the brakes are defective (unreasonably dangerous). He would be liable for damages proximately caused as a result of the defective brakes. Vicarious liability under Article 2320 is *not* analytically dissimilar. The employer is liable for the torts of the employee whether or not the employer knew of the occurrence, propensity, or likelihood of the particular employee's tortious conduct. Thus, vicarious liability fits in with the "strict liability" articles that surround it because the employer is liable for the employee's torts, even though the employer has *not* committed an intentional tort and is *not* personally negligent. Ironically, fitting in requires one to ignore the third paragraph of Article 2320.

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22. See La. Civ. Code art. 1.

23. See e.g., *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467 (La. 1990).

24. See, e.g., *Boyer v. Seal*, 553 So. 2d 827 (La. 1989).

25. See generally Galligan, *supra* note 6.

However, in vicarious liability there is a *real* tort, the employee's tort, which gets passed upstream to the employer. That is not the case with strict liability under the other "strict liability" articles. There is (often) no *real* tort, i.e., no intentional tort or negligence. Finally, with vicarious liability we are left with a rule that satisfies no one purpose of tort law fully or logically but, at best, partially serves some of them. Maybe that is the best we can hope for where the minds of reasonable social engineers disagree.<sup>26</sup>

*e. Vicarious Liability for Strict Liability?*

Before I return to the world of nuts and bolts, let me consider a quasi-practical problem which is raised by some of my most recent discussion. I asked repeatedly why does vicarious liability stop at the employee's tort? I never satisfactorily answered. I cannot. Now, let me ask whether vicarious liability in Louisiana stops at the servant's negligence or intentional tort. Suppose Hunt does not supply its employees, like Guillory, with welding torches; the employees supply their own. Further, suppose Guillory's torch was defective and he neither knew nor should have known of that fact.

If the defect in the torch caused the explosion, one assumes Guillory might be strictly liable to Hector under Article 2317, as the custodian (guardian) of an unreasonably dangerous, damage-causing thing. If so, would Hunt be vicariously liable for Guillory's strict liability? Would we pass Guillory's strict liability upstream to the master, Hunt?

A court could manipulate the concept of *garde* to quite properly find that Hunt had *garde* over the torch because of the benefit it derived therefrom. But, assuming the court would not deftly dodge the bullet in that manner, should Hunt be vicariously liable for Guillory's strict liability? I think the answer is yes for a number of reasons. Most basically, if we accept at least some of the notion of enterprise liability, Guillory is working for the Hunt enterprise when the tank explodes, injuring Hector. Moreover, presumably Hunt has Guillory supply the torch for its own convenience and that convenience should not be the basis for liability avoidance. That convenience provides a benefit, and the benefit theory is one justification for vicarious liability. Interestingly, a finding of benefit may also justify a finding of employer *garde* over the torch. Additionally, the only difference between Article 2317 strict liability and negligence is that, in strict liability, the plaintiff need not prove the custodian of the thing knew or should have known of the thing's unreasonably dangerous characteristic.<sup>27</sup> If an irrebuttable presumption of knowledge works against Guillory, why should it not also work against Hunt? Put differently, if what Guillory is held liable for is essentially negligence with one less element (knowledge or constructive

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26. Pardon this little theoretical sojourn, but it helps me to grasp a little of that which I do not truly understand. It helps me to see the limits of logic, even in a logical game like the law.

27. See *supra* note 25 and accompanying text.

knowledge), should not Hunt be vicariously liable just like it would be if Guillory really was negligent? I believe so. Let me return now to a more practical problem posed by the workplace tort.

*f. Solidarity*

If Guillory is liable to Hector because he was negligent and Hunt is liable to Hector because it is vicariously liable for Guillory's torts, what is the nature of Guillory's and Hunt's liability to Hector? Guillory and Hunt are solidarily liable to Hector.<sup>28</sup> Does it matter that the sources of their obligations are arguably different? That is, can Guillory and Hunt be solidarily liable where Guillory is liable because of his personal fault, pursuant to Articles 2315 and 2316, and Hunt is vicariously liable, pursuant to Article 2320? The different sources of the obligations make no difference whatsoever.<sup>29</sup> Louisiana Civil Code article 1797 expressly provides that an obligation may be solidary although the sources of liability of the obligors are different.<sup>30</sup>

Clearly, before the summer of 1987 Guillory and Hunt were solidary obligors. But are they still? The reason for this question is that in the summer of 1987 the Louisiana Legislature amended Louisiana Civil Code article 2324, dealing with "tort solidarity."

Prior to the summer of 1987, we knew that vicariously liable employers and their tortfeasor employees were solidarily liable for the damage the tortfeasor employee caused when he committed a tort in the course and scope of his employment.<sup>31</sup> However, the Legislature amended Article 2324 to drastically affect solidary liability in tort.<sup>32</sup> Article 2324(B) now provides that solidary liability in tort, except in intentional tort cases and "as otherwise provided by law," is limited "to the extent necessary" for the injured plaintiff to recover "fifty percent of his recoverable damages."<sup>33</sup> Whatever effect the new article may have outside the vicarious liability context, the phrase in Article 2324(B) that obligors are still solidarily liable "as otherwise provided by law" should preserve traditional solidarity between the employee and the vicariously liable employer. Consequently, Hector could recover *all* of his damages from either Guillory *or* Hunt. The employer and the tortfeasor employee are still solidarily liable for *all* of the damages the employee causes. Therefore, the solidary liability of the employer and the tortfeasor employee is not affected by the other limitations on solidary liability contained in amended Article 2324. Their solidary liability

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28. See La. Civ. Code art. 2324(B); *Foster v. Hampton*, 381 So. 2d 789 (La. 1980).

29. Of course, if Hunt is a corporation then Guillory's tort is its tort and the source of the obligations is the same. Both Guillory and Hunt would be actual tortfeasors.

30. See also *Narcise v. Illinois Cent. G.R.R.*, 427 So. 2d 1192 (La. 1983).

31. See *Foster v. Hampton*, 381 So. 2d 789 (La. 1980).

32. La. Civ. Code art. 2324(B); *Touchard v. Williams*, 617 So. 2d 885 (La. 1993).

33. La. Civ. Code art. 2324(B).

remains as it was because of the "as otherwise provided by law" provision in Article 2324(B).

Thus, if Guillory's negligent welding caused Hector one hundred thousand dollars in damages and Hunt was vicariously liable for Guillory's tort, Hector could choose to recover one hundred thousand dollars from either Guillory or Hunt. Under normal circumstances, Hector would probably select Hunt. If Hector was limited to recovering 50% of his recoverable damages from Hunt, the effect of vicarious liability would be halved. Thus, an enterprise, like Hunt, would only face liability for 50% of the costs of its servants' torts. Hunt would only pay half the damages its operations caused. This result would inordinately sacrifice several of the arguable ends served by vicarious liability, i.e., deterrence, compensation, and placing loss on the enterprise as a cost of doing business.

*g. Hector v. Guillory—Indemnity and Louisiana Revised Statutes 9:3921*

Assuming Guillory and Hunt are solidarily liable to Hector, another interesting question arises. If Hector recovers his full one hundred thousand dollar judgment from Hunt, what rights would Hunt have against Guillory? Could Hunt seek indemnity or contribution from Guillory? Normally, because employees do not have sufficient assets to pay damage awards and because employers want to preserve good relations with their work forces, employers do not seek indemnity from their employees. But, what if Hunt did?

Louisiana Civil Code article 2324(B) expressly provides that it does not affect indemnity or contribution among solidary obligors. Moreover, the third paragraph of Article 1804 provides that, where an obligation is solidary and the circumstances which give rise to the obligation concern only one of the obligors, the other obligors are like sureties. This means any other obligor who is required to pay the whole may seek indemnity from the obligor out of whose fault the solidary obligation arose. In the employer/employee context, an argument could be made that the employee's conduct was what gave rise to the liability; thus, he should indemnify the employer. Between Hunt and Guillory, it was Guillory's conduct that caused Hunt to be "technically" at fault. Although Hector could seek 100% of his damages, or \$100,000, from either Guillory or Hunt, as between Guillory and Hunt, Guillory is 100% at fault and Hunt is 0% at fault. Thus, Hunt should be entitled to indemnity from Guillory.<sup>34</sup>

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34. See *Barbin v. State*, 506 So. 2d 888 (La. App. 1st Cir. 1987). Of course, once again, if the servant's conduct is also the master's conduct, we might reach a different conclusion. This is true, by definition, with the corporate employer. One could argue that *both* Hunt and Guillory *are* 100% at fault. They are one and the one is 100% at fault. Hunt's fault, if servant and master *are* treated as one, is *not* merely technical or imputed, it is real. But, what about the rights between them? Under this reasoning, indemnity under Article 1804 would be unavailable because the circumstances giving rise to the solidary obligation would *not just* concern one of the obligors. Would Hunt have

Whatever theoretical effect Article 1804 might have in this regard is drastically undermined by Louisiana Revised Statutes 9:3921, which provides:

A. Notwithstanding any provision in Title III of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950 to the contrary, every master or employer is answerable for the damage occasioned by his servant or employee in the exercise of the functions in which they are employed. Any remission, transaction, compromise or other conventional discharge in favor of the employee, or any judgment rendered against him for such damages shall be valid as between the damaged creditor and the employee, and the employer shall have no right of contribution, division, or indemnification from the employee nor shall the employer be allowed to bring any incidental action under the provisions of Chapter 6 of Title I of Book II of the Louisiana Code of Civil Procedure against such employee.

B. The provisions of this Section are remedial and shall be applied retrospectively and prospectively to any cause of action for damages arising prior to, on, or after the effective date of this Section.<sup>35</sup>

In most instances, under the statute, an employer has no indemnity or contribution action against its employee; however, the employer still remains primarily liable for the employee's torts. Clearly, contribution and indemnity are unavailable if the plaintiff takes a judgment against the employee, settles with the employee, or otherwise remits the employee's obligation. Louisiana Revised Statutes 9:3921 is an employee protection statute. However, one will note there is a loophole in this anti-indemnity statute. Assuming Hector neither sues nor settles with Guillory but only proceeds against Hunt, the statute does not expressly prohibit Hunt from later pursuing Guillory for contribution or indemnity. But an employee might argue that the very purpose of Louisiana Revised Statutes 9:3921 is to prevent indemnity or contribution actions by employers against employees and that allowing an indemnity or contribution action, even within the statutory loophole, would be contrary to the statute's obvious purpose. The counter argument would be that the Legislature did not expressly proscribe indemnity or contribution actions in the loophole situation; thus, they should be available.

We lawyers have all seen similar disputes over statutory construction before and must leave this one to the courts to resolve. However, the law student, lawyer, and judge should know there is some language in a footnote in *Dusenberry v. McMoRan Exploration Co.*,<sup>36</sup> stating that it may be against public policy to allow

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contribution rights? To what extent? Fifty percent based on some rough sense of justice?

35. La. R.S. 9:3921 (1991). The statute creates a personal defense. Thus an employer's insurer may seek indemnity from an employee's insurer. *Liberty Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 579 So. 2d 1090 (La. App. 4th Cir.), writ denied, 586 So. 2d 563 (1991).

36. 458 So. 2d 102 (La. 1984).

an employer to seek indemnity or contribution from an employee for whose conduct the employer is vicariously liable.<sup>37</sup> Moreover, one can see no policy reason for allowing indemnity or contribution in the loophole scenario but *not* allowing it in the others. That is, there is no real policy distinction between the instances where indemnity and contribution are expressly outlawed and the loophole situation where they are not. The loophole situation may be pure legislative oversight. Interestingly, as originally enacted, Louisiana Revised Statutes 9:3921 did not expressly proscribe indemnity or contribution when the victim got a judgment against the employee. The legislature added that proscription in 1988.<sup>38</sup> The expanding scope of the proscription against indemnity or contribution might lead one to conclude that any employer action for contribution or indemnity is proscribed in a vicarious liability setting. But, the loophole remains.

*i. The Effect of Louisiana Revised Statutes 9:3921 on Vicarious Liability*

I must tarry for one last minute over Louisiana Revised Statutes 9:3921. The issue is of more than passing importance. To paraphrase, the statute says that if the injured victim, here Hector, settles with (or otherwise releases) the negligent employee, Guillory, the vicariously liable employer, Hunt, is *still* liable. Before the passage of the statute, the supreme court had so held in *Sampay v. Morton Salt Co.*<sup>39</sup> But, how can this be? For one, if the basis of Hunt's liability to Hector is Guillory's negligence or fault *and* Hector releases Guillory, *what* fault is there to impute or pass upstream to Hunt? None, it seems. Additionally, under Article 1803, settlement with one solidary obligor reduces the liability of the others by the share of the settling obligor. If Guillory is really the one who is 100% at fault and Hunt is only technically at fault, would not Hector's settlement with Guillory reduce Hunt's liability by 100%? That is, would not Hector's settlement with Guillory effectively release Hunt too? Logically, the answer may be yes; but, clearly the statute contemplates the illogical result—even after Hector releases Guillory, Hunt *is* still liable.

How can it be that, after Hector releases Guillory, Hunt is vicariously liable? Well, the statute says so—sort of.<sup>40</sup> The statute definitely reiterates Article 2320 by providing for vicarious liability. It also proscribes contribution and/or indemnity after settlement with or judgment against the employee. Therefore, the legislature apparently contemplated the master's vicarious liability for a servant's torts even after settlement or release with the servant. But, logically, how?

First, one might note the statute's effect is not inconsistent with the notion that the employer's vicarious liability is more than just passing the employee's fault or

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37. *Id.* at 104 n.1.

38. 1988 La. Acts No. 401.

39. 395 So. 2d 326 (La. 1981).

40. It does not expressly say that, but it seems to imply that result.

tort upstream. That is, the employer or enterprise is *not* just imputed with the fault of the servant, but really *is* at fault itself. In this vein, the master is a *real*, not merely a technical, tortfeasor. Thus, releasing the employee does *not* release the employer. There are some analogous situations in Louisiana tort law in which releasing one obligor does *not* release the other. Releasing a tortfeasor insured apparently does not release the insurer.<sup>41</sup> Nor does releasing the tortfeasor and/or his liability insurer release the victim's UM carrier.<sup>42</sup> In each of these instances, the remaining obligor's liability is derived from or based upon the released tortfeasor's (obligor's) fault.

Moreover, there are other instances where an inability to recover from the tortfeasor does *not* bar suit against the tortfeasor's insurer. One spouse may not sue another in tort during the marriage, but the victim spouse may sue the tortfeasor's insurer.<sup>43</sup> The insurer may not assert the tortfeasor's immunity since the immunity is personal.<sup>44</sup> Analogously, in the vicarious liability setting, the vicariously liable defendant may not assert the "non-liability," through settlement or release, of the employee. However, a difference remains between the spousal immunity and the employer/employee situation. If a husband is injured by his wife and a third party, the husband may recover from the third party, who may seek contribution from the wife.<sup>45</sup> Under Louisiana Revised Statutes 9:3921, an employer, unlike a third party tortfeasor, may not seek contribution from an employee.

Thus, although the employer/employee relationship under Louisiana Revised Statutes 9:3921 has some analogies, it is *sui generis*. And, as noted, it seems Louisiana Revised Statutes 9:3921 recognizes an important principle of vicarious liability; the employer *is* a real tortfeasor *and* the employer remains liable despite the employee's intervening settlement or other remission of his obligation. But one final problem merits consideration. Assume Hector sues *both* Guillory and Hunt. The sole basis of Hunt's liability is vicarious. Further, suppose that before trial Hector settles with Guillory for \$10,000. Then, assuming the jury returns a verdict against Hunt and determines Guillory's total damages to be \$100,000, how much should Hector recover from Hunt?

## *ii. Post-Settlement Vicarious Liability*

Normally a settlement with one solidary obligor releases the liability of the other(s) by the share of the settling obligor. In a tort case, the settling obligor's

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41. See W. Shelby McKenzie & H. Alston Johnson, III, Insurance Law and Practice § 28, at 81-82, in 15 Louisiana Civil Law Treatise (1986).

42. See, e.g., *Bosch v. Cummings*, 520 So. 2d 721 (La. 1988).

43. See La. R.S. 9:291 (1991); *Guillot v. Travellers Indem. Co.*, 338 So. 2d 334 (La. App. 3d Cir. 1976), *writ refused*, 341 So. 2d 408 (1977).

44. See *Guillot v. Travellers Indem. Co.*, 338 So. 2d 334 (La. App. 3d Cir. 1976), *writ refused*, 341 So. 2d 408 (1977).

45. *Id.*

share is determined by his percentage of fault. Here, Guillory's portion seems to be 100%. As we said above, if Guillory's share is 100% and Hunt's share is 0%, Hector's settlement with Guillory for \$10,000 would effectively release Hunt as well, and Hector would thereby get nothing from Hunt. This would provide a disincentive to settling with (or otherwise releasing) Guillory. It would also be contrary to Louisiana Revised Statutes 9:3921, which implies that, even after settlement, Hunt remains liable. But, if Hunt is still liable to Hector, should Hector be allowed to keep the \$10,000 from Guillory *and* recover \$100,000 from Hunt? That would make him more than whole. We could use a per capita rule based on an analogy to how solidary obligors are treated in contract cases,<sup>46</sup> and reduce recovery from Guillory by one-half. But, that seems rather artificial and would also impede settlements with employees.

A sensible solution would be to deviate from the normal rules regarding settlement, under which an obligor's share is equal to his percentage of fault, and give Hunt a dollar for dollar credit against the \$100,000 for the amount Hector received from Guillory, or \$10,000, treating the \$10,000 as partial performance under Louisiana Civil Code article 1802 of a solidary obligation. Thus, Hector would recover \$90,000 from Hunt. Hector would be made whole, not more, and Hunt would remain vicariously liable while still getting some credit for Guillory's settlement. Under Louisiana Revised Statutes 9:3921, Guillory would *not* be liable to Hunt for indemnity or contribution. I am sure I have not thought of everything; but, in any event, I will move on. I know my student readers (and who knows who else) are getting tired of this. Obviously, these issues of indemnity and contribution may arise outside the workplace tort context; however, they are unavoidable in the context of workplace tort.

#### 4. *Hector v. M&M*

##### a. *Independent Contractors*

To recap, Hector can probably recover from either Guillory or Hunt; might he recover instead (or also) from M&M? Here we need to get into some more categorizing. If Hunt, and/or Guillory, is an independent contractor of M&M, then M&M will usually not be vicariously liable for its independent contractor's torts. How does one tell whether or not Hunt (Guillory) is an independent contractor or if there is a master/servant relationship?

The Louisiana Supreme Court laid out some of the relevant factors for determining independent contractor status in *Hickman v. Southern Pacific Transport Co.*<sup>47</sup> In *Hickman*, the court stressed the *independent* nature of the *independent* contractor's business. Typically, an independent contractor can choose to do the work in any number of different ways. That is, the method of

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46. For example, see the second sentence of La. Civ. Code art. 1804.

47. 262 La. 102, 262 So. 2d 385 (1972).



fulfilling the contract is non-exclusive. The contractor can choose his own methods of operation. Likewise, the contractor is normally not under the control of the principal. Furthermore, neither party can terminate the principal/independent contractor relationship (at will) without fear of a breach of contract action. Again, in our hypothetical situation, if Guillory is an independent contractor, M&M will not be vicariously liable for Guillory's tort unless there is some applicable exception to the general non-liability rule.

*b. Some Exceptions to the No Liability for Independent Contractor's Torts Rule*

*i. Control*

As for those exceptions, even if Hunt is an independent contractor, M&M may be liable for Guillory's torts if M&M had operational control over the work.<sup>48</sup> This first exception really is not an exception at all because if, M&M had operational control over the details of Guillory's work, then Guillory really was not an independent contractor at all. If M&M had control, Guillory is a servant for whom M&M would be vicariously liable.

*ii. Ultrahazardous or Inherently Dangerous Work*

Even if M&M did not control the work, if the contract work is ultrahazardous or inherently dangerous, then a principal, like M&M, will be liable for the conduct of the independent contractor.<sup>49</sup> Ultrahazardous activities are those activities which cannot be done safely.<sup>50</sup> Examples include: blasting, crop dusting, pile driving, storage of hazardous chemicals, and excavation.<sup>51</sup> It is beyond the scope of this article to discuss what is and what is not an ultrahazardous activity. However, two Louisiana cases, one a Louisiana Supreme Court case, portend a drastic expansion of this category of liability, at least for landowners and land users.<sup>52</sup>

One interesting point concerning this exception to the non-liability for independent contractor's torts rule is that a principal will be liable for the torts of an independent contractor if the work is either ultrahazardous or inherently

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48. See *Triplette v. Exxon Corp.*, 554 So. 2d 1361 (La. App. 1st Cir. 1989).

49. See *Bergeron v. Blake Drilling & Workover Co.*, 599 So. 2d 827 (La. App. 1st Cir.), writs denied, 605 So. 2d 1117, 1119 (1992).

50. *Id.*

51. See generally Galligan, *supra* note 6.

52. See *Butler v. Baber*, 529 So. 2d 374 (La. 1988); *Street v. Equitable Petroleum Corp.*, 532 So. 2d 887 (La. App. 5th Cir. 1988). Subsequently, in *Inabet v. Exxon Corp.*, No. 93-C-608 (La. Sept. 5, 1994), the Louisiana Supreme Court somewhat limited *Butler*, at least in cases in which both plaintiff and defendant hold coexisting rights in the same property. Thus, the plaintiff must show more than simply cause and damages to recover. What other effect *Inabet* may have is open to question.

dangerous.<sup>53</sup> There does not seem to be a well developed jurisprudential definition of what is inherently dangerous work. One wonders whether inherently dangerous work is synonymous with, or somehow different from, ultrahazardous work. Is the inherently dangerous category broader? Might work be inherently dangerous even though the work does not involve an ultrahazardous activity? The courts that have defined inherently dangerous work have said that work is inherently dangerous if it cannot be done safely.<sup>54</sup> Inability to do the work safely is one of the factors courts use to determine whether an activity is ultrahazardous. Arguably then, ultrahazardous and inherently dangerous are synonymous in this context. Only time will tell whether there is a true distinction between ultrahazardous activities and inherently dangerous work. So let me move on to another exception to the non-liability for independent contractors rule.

### *iii. Independent Negligence of the Principal*

A principal is liable for the tort of an independent contractor if the principal was personally negligent in selecting the independent contractor. Thus, in the hypothetical, if everyone in the well overhauling business knew that, whenever you called Hunt to weld there was an explosion, one might conclude that M&M was negligent for hiring Hunt and that M&M's negligence would be a basis for M&M's liability to Hector. Here, it is technically incorrect to say the principal is liable for the tort of the independent contractor. The principal is liable for its *own* tort: negligent selection of Hunt. However, the independent contractor's tort is relevant to M&M's liability; the independent contractor's tort (including, by definition, the consequent damage) is the risk that triggered, in part, the principal's duty to reasonably select someone to carry out the relevant work, i.e., not to select Hunt.

### *iv. Joint Ventures*

Another so-called exception arises in joint ventures. If Hunt was an independent contractor and M&M and Hunt were engaged in a joint venture, M&M would be vicariously liable for Hunt's employees' torts. Here Guillory is the employee of both M&M and Hunt, so M&M is responsible for Guillory's tort.

### *v. Non-Delegable Duties*

M&M would also be liable for the torts of its independent contractor if M&M had a non-delegable duty to see that the contract work was done safely.

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53. *Bergeron v. Blake Drilling & Workover Co.*, 599 So. 2d 827 (La. App. 1st Cir.), *writs denied*, 605 So. 2d 1117, 1119 (1992).

54. *Triplette v. Exxon Corp.*, 554 So. 2d 1361 (La. App. 1st Cir. 1989).

The non-delegable duty concept is more fully developed outside of Louisiana. It is most clearly articulated in the Restatement (Second) of Torts. The Restatement provides that a principal will be liable for the torts of an independent contractor if the work must be done in conformity with certain statutes or regulations<sup>55</sup> or if the work is particularly dangerous.<sup>56</sup> In such cases, the Restatement provides that the principal has a non-delegable duty to see that the work is done safely.<sup>57</sup> One notes the similarity between the Restatement's non-delegable duty for dangerous work and Louisiana's imposition of liability on the principal for inherently dangerous work. Once again, only time and further jurisprudence will tell how close the relationship is.

*c. The Big Exception: The Borrowed Servant*

Finally, and perhaps most importantly, M&M will be vicariously liable for Guillory's torts, even if Hunt looks like an independent contractor, if Guillory is M&M's borrowed servant. What effect does it have if Guillory is M&M's borrowed servant? Here, in *Hector v. M&M*, M&M will be vicariously liable for Guillory's torts just as if M&M was Guillory's actual payroll employer. Before we begin the discussion of how one determines whether Guillory was M&M's borrowed servant, some relevant terms must be defined.

First, the "borrowed servant" is Guillory. What do we call Hunt? In the borrowed servant setting, Hunt is known as the "general employer," and if M&M has, in fact, borrowed Guillory, M&M is called the "special employer."

How does one tell whether Guillory has become M&M's borrowed servant? First, courts have looked at who had the right to control the details of Guillory's work.<sup>58</sup> Second, courts have asked whether the special employer, M&M, was exercising control over Guillory.<sup>59</sup> Likewise, the courts have asked whether the general employer, Hunt, relinquished his right to control the borrowed servant, Guillory.<sup>60</sup> Another factor is whose work Guillory was performing at the relevant time.<sup>61</sup> This is akin to the normal vicarious liability course and scope determination, but courts use it here to determine borrowed servant status. In some cases, courts spoke of a presumption that Guillory, the alleged borrowed servant, was doing the general employer's work at the time of the tort. That is, in our hypothetical, if Hector sued M&M claiming Guillory was M&M's

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55. Restatement (Second) of Torts § 424 (1965).

56. *Id.* § 423.

57. *Id.* §§ 423, 424. In Louisiana the most notable reference to a non-delegable duty is in *Olsen v. Shell Oil Co.*, 365 So. 2d 1285 (La. 1978) (dealing with the non-delegable duty of a building owner to see that its building and appurtenances do not pose an unreasonable risk of harm under La. Civ. Code art. 2322).

58. *Blair v. Tynes*, 621 So. 2d 591 (La. 1993).

59. See *Berry Bros. Gen. Contractors v. Air Marine, Inc.*, 328 So. 2d 771 (La. App. 1st Cir. 1976).

60. *Id.* at 774.

61. *Id.* See also *Benoit v. Hunt Tool Co.*, 219 La. 380, 53 So. 2d 137 (1951).

borrowed servant, Hector would have to overcome a presumption that Guillory was still doing Hunt's business and was *not* M&M's borrowed servant.<sup>62</sup>

Some more recent decisions of the courts of appeal have listed the following factors as relevant in determining borrowed servant status: right to control, selection of employee, payment of wages, right to fire, furnishing of tools and place to perform work, length of new employment, whose work was being done, agreement between employers, borrowed employee's acquiescence in the new work situation, termination of relationship between general employer and employee, and general employer's relinquishment of control.<sup>63</sup> Thus, one can see that, whatever factors are used, the determination of borrowed servant status is a fact-intensive, case-specific matter,<sup>64</sup> just like the determination of whether or not a worker is in the course and scope of his employment.

While on the subject of relevant factors, two of those listed immediately above cause me to stop and speak out. First, let me direct my attention to the right to fire. Rarely would a special employer have the right to actually "fire" a borrowed servant. The special employer may have the right to send the borrowed servant off the job without facing liability for breach of contract, but *not* to terminate the borrowed servant's employment. M&M may have the right to send Guillory back to Hunt and the right to tell Hunt to send over some other welder. This is not, in essence, the right to fire because M&M does not have the right to terminate Guillory's relationship with Hunt. However, the unfettered right to send a person off a job is indicative of borrowed servant status. Of course, there are situations in which large entities, principally refineries, may have employees of independent contractors on site for years at a time. In such situations, the principal may, in fact, have the right to effectively terminate the employment of the borrowed servant by deciding the work no longer needs to be done or that the borrowed servant is no longer needed. However, the mere existence of such situations, in and of themselves, should not mean that merely because the alleged special employer does *not* have the right to actually fire the borrowed servant in the traditional sense, the alleged special employer is *not* vicariously liable for the torts of the alleged borrowed servant.

The second factor which raises my intellectual antennae is: whose work was being done? In many cases, the alleged borrowed servant is doing the work of both the general employer and the special employer. For instance, in my hypothetical situation, if Hunt's business (or a significant part thereof) was to rent out welders and welding equipment, then, when Guillory is welding at M&M's job site, Guillory is involved in Hunt's business. Likewise, in welding

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62. On the presumption generally, see *Benoit*, 219 La. at 389-90, 53 So. 2d at 140. *But see* *LeJeune v. Allstate Ins. Co.*, 365 So. 2d 471 (La. 1978).

63. *See generally* *Green v. Popeye's, Inc.*, 619 So. 2d 69 (La. App. 3d Cir. 1993); *Billeaud v. Poledore*, 603 So. 2d 754 (La. App. 1st Cir. 1992).

64. For the factors that the United States Fifth Circuit Court of Appeals has considered relevant when determining borrowed servant status in the LHWCA context, see *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977).

on M&M's rig, Guillory is engaged in M&M's business. In this context, Guillory may be working in and furthering both businesses. This will be directly relevant to our next inquiry.

*i. The One Master Rule*

If a court decides Guillory was M&M's borrowed servant at the time of the tort, M&M will be vicariously liable for Guillory's torts. Under the old jurisprudence, and the *Benoit* case, a servant could have only one master at a time.<sup>65</sup> Thus, if Guillory was M&M's borrowed servant, Guillory's employment relationship with Hunt was legally (fictionally) suspended from the moment of the borrowing. The Hunt/Guillory relationship was, in a typically fictitious legal way, temporarily terminated or suspended. This meant that, as soon as Guillory became a borrowed servant of M&M, Hunt was no longer vicariously liable for Guillory's tort. Thus, under *Benoit*, if at the time Guillory's negligence caused Hector's injuries, Guillory was a borrowed servant of M&M, M&M, and *not* Hunt, was vicariously liable for Guillory's tort. Likewise, if Guillory was *not* a borrowed servant of M&M, then Hunt remained vicariously liable for his tort.

*ii. The Two Masters Rule*

The Louisiana Supreme Court overturned the one master rule in *LeJeune v. Allstate Insurance Co.*<sup>66</sup> when it expressly repudiated it. In *LeJeune*, a funeral parlor borrowed a hearse driver from another funeral parlor. While borrowed, the hearse driver was involved in an accident and one of the special employer's employees was killed. The decedent's beneficiaries sued the borrowed servant's general employer. The Louisiana Supreme Court held that a borrowed servant may have two masters at one time and, in dicta, said that both masters would be solidarily (vicariously) liable for the borrowed servant's tort.<sup>67</sup> In our hypothetical, that means if Guillory was a borrowed servant of M&M, Hunt would be vicariously liable for Guillory's torts. The *LeJeune* court also rejected the previously prevalent presumption that an alleged borrowed servant was still engaged in the general employer's business at the time of the tort. Thus, under *LeJeune*, if Guillory was M&M's borrowed servant, Hector could choose to recover from Guillory, M&M, or Hunt. As I point out below, they would all be solidarily liable to Hector.

Interestingly enough, the *LeJeune* two master rule lay dormant for a number of years. After *LeJeune*, some courts of appeal still spoke in terms reminiscent

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65. See *Benoit*, 219 La. at 389-90, 53 So. 2d at 140; *Berry Bros. Gen. Contractors v. Air Marine, Inc.*, 328 So. 2d 771, 774 (La. App. 1st Cir. 1976).

66. 365 So. 2d 471, 482 (La. 1978).

67. *Id.*

of the one master rule. Particularly, they approvingly referred to the presumption that the servant was still engaged in the general employer's business.<sup>68</sup> However, in 1993, in *Blair v. Tynes*,<sup>69</sup> the Louisiana Supreme Court reiterated the two master rule, holding both an American Legion Post, which had hired some sheriff's deputies to control traffic for the night, and the sheriff's office vicariously liable for the sheriff's deputies' failure to adequately control traffic. Thus, the two master rule clearly seems to be the rule in Louisiana.

The two master rule is the more sensible rule, especially in cases where the general employer is engaged in the business of renting out people and equipment (or at least sometimes renting out people and equipment). In situations where the general employer's business is to rent out his or her employees and equipment to others, the general employer's business is being furthered even if he does not control the details of the actual work. Moreover, the special employer benefits: it is his work that is being done as well. In such situations, the relevant enterprise benefitted by the work consists of the combination of the general and special employers. The two master rule represents a triumph of function over (legal) fiction.

However, even after *LeJeune* and *Blair*, one wonders whether there may not be situations where an employee is so truly "borrowed" that the general employer no longer remains vicariously liable. Of course, as I have said before, only time will tell; however, it seems best not to rule out any potential result when discussing torts cases.

How would M&M, Hunt, and Guillory be liable if Guillory's negligence caused injury to Hector and Guillory was a borrowed servant of M&M? In *LeJeune*, in dicta, the supreme court said the special and general employers would be solidarily liable to the injured victim.<sup>70</sup> Nothing in Article 2324(B) changes this result. The various defendants would be solidarily liable "as otherwise provided by law."

##### 5. *M&M v. Hunt—Contribution and Indemnity*

Assuming M&M and Hunt (and Guillory) are solidary obligors, what rights do M&M and Hunt have between themselves? In *LeJeune*, the court expressly left open the question of indemnity and contribution between the two masters. One may argue that, on the indemnity or contribution issues, a court should consider whose work was actually being furthered (or more furthered). That party should owe the other contribution, or possibly even indemnity. If permitted, indemnity agreements between the two masters would be relevant.

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68. See, e.g., *Smith v. Two "R" Drilling Co.*, 606 So. 2d 804, 813 (La. App. 4th Cir.), writ denied, 607 So. 2d 560 (1992); *Civello v. Johnson*, 567 So. 2d 643, 646 (La. App. 4th Cir.), writ denied, 569 So. 2d 987 (1990); *Johnson v. Alexander*, 406 So. 2d 1378, 1384 (La. App. 3d Cir. 1981), rev'd on other grounds, 419 So. 2d 451 (1982).

69. 621 So. 2d 591 (La. 1993).

70. *LeJeune*, 365 So. 2d at 482.

However, an indemnity agreement would be unenforceable if the work related to a well and it was covered by the Louisiana Oil Field (Anti) Indemnity Act.<sup>71</sup> Likewise, indemnity would not be proper if the special employer was a governmental entity and the general employer was a contractor; there is a statutory proscription against contractual indemnity in such situations.<sup>72</sup>

When interpreting enforceable indemnity agreements in the workplace, or elsewhere, one must be cognizant of the general rules concerning contractual indemnity in Louisiana. In Louisiana, it is not against public policy for one entity to indemnify another against that other's negligence.<sup>73</sup> However, the intent to indemnify must clearly appear from the four corners of the document, and the court will not go outside the document itself to consider custom, usage, and equity.<sup>74</sup> However, when considering whether or not an agreement is intended to indemnify one against strict liability, the court will interpret the agreement in light of custom, usage, and equity.<sup>75</sup>

### *B. Injured Workers*

It is time to change the hypothetical to the actual facts of the *Benoit* case.<sup>76</sup> When Guillory welded on the tank that was filled with a flammable substance, the explosion injured an M&M employee, the man who lent his name to the case, Benoit.<sup>77</sup> From whom and how much could Benoit recover?

#### *1. Benoit v. M&M—Worker's Compensation*

First, what would Benoit recover from M&M? Benoit would recover worker's compensation benefits from M&M.<sup>78</sup> He would recover only compensation benefits from M&M because M&M, as his payroll employer, would be immune from most tort actions.<sup>79</sup> In order to recover compensation benefits, Benoit would have to establish that his injury occurred as a result of an "accident arising out of and in the course of his employment."<sup>80</sup> Arising out of and in the course of employment are two separate elements but they are not

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71. La. R.S. 9:2780 (1991).

72. La. R.S. 38:2216(G) (Supp. 1994).

73. Polozola v. Garlock, 343 So. 2d 1000 (La. 1977).

74. *Id.*

75. See *Sovereign Ins. Co. v. The Texas Pipe Line Co.*, 488 So. 2d 982 (La. 1986).

76. See *supra* text accompanying notes 2-3.

77. In actuality, Guillory also injured Holloway. But, as you can see, I have relegated him to a footnote.

78. See generally La. R.S. 23:1031 (Supp. 1994).

79. See La. R.S. 23:1032 (Supp. 1994).

80. La. R.S. 23:1031 (Supp. 1994).

unrelated.<sup>81</sup> Courts analyze these two elements on a continuum with a relatively strong showing of one element negating a weak showing as to the other.<sup>82</sup>

Of course, if the injury Benoit suffered was not one covered by compensation benefits, he may have a tort claim against M&M. H. Alston Johnson, III has referred to these as "comptorts."<sup>83</sup> I will only discuss one comptort; but, as Johnson points out, there may be many others. For instance, in 1989, the legislature drastically rewrote the worker's compensation statute<sup>84</sup> to make it more difficult for an employee to recover compensation benefits from his employer. One of the statutes that the legislature rewrote was the statute governing liability for heart-related or perivascular injuries.<sup>85</sup> Now, a worker who suffers a heart-related or perivascular injury only recovers compensation benefits if he shows, by clear and convincing evidence, that the physical work stress he was subjected to at work was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee of the worker's occupation and that the physical work stress or exertion and not some other source of stress or some pre-existing condition was the predominate cause of the heart-related or perivascular injury, illness, or death.<sup>86</sup>

In *Hunt v. Womack*,<sup>87</sup> a worker alleged that he had a pre-existing heart condition and that he was forced to work in a ditch on a construction project in the summer in Louisiana in ninety-degree weather with inadequate rest breaks or ventilation. The employer filed an exception saying the worker had not stated a cause of action. The worker replied he was not seeking compensation benefits but was seeking tort recovery. The Louisiana First Circuit Court of Appeal concluded that, since the worker had expressly pled himself *out of* worker's compensation coverage, he had a possible tort claim.

The supreme court effectively endorsed the *Hunt* result in a later case. In *Charles v. The Travelers Insurance Co.*,<sup>88</sup> the supreme court held a stroke was a perivascular injury within the new heart attack statute and the worker in the case before it was not entitled to benefits. However, in a footnote, the court stated:

Having found the legislature has intended through La. R.S. 23:1021(7)(e) to increase the plaintiff's burden of proving a compensation claim for heart attacks and strokes, we note the legislature's actions may have the result, albeit unintended, of exposing some employers, in those cases where the plaintiff can prove the elements of his claim, to the more financially harsh tort liability for those heart attacks and strokes now

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81. See *Mundy v. Department of Health and Human Resources*, 593 So. 2d 346 (La. 1992).

82. *Id.* at 349.

83. H. Alston Johnson, III, *Recent Developments in Torts* 1 (1994) (Paper presented to Louisiana Judicial College, June 6, 1994).

84. 1989 La. Acts No. 954.

85. La. R.S. 23:1021(7)(e) (Supp. 1994).

86. *Id.*

87. 616 So. 2d 759 (La. App. 1st Cir. 1993).

88. 627 So. 2d 1366 (La. 1993).



excluded from compensation coverage, whereas under the prior jurisprudence, those same injuries would have fallen under the scope of the Act.<sup>89</sup>

One wonders whether similar tort claims may be raised in situations in which workers are injured on the job and may not recover for worker's compensation benefits because of the 1989 tightening of the worker's compensation laws.

Back to the hypothetical, if *Benoit* could somehow establish that he was the victim of an intentional tort committed by his employer, M&M, or by a co-employee in the course and scope of his employment with M&M, then Benoit would be allowed to recover both tort damages *and* compensation benefits. This is because the worker's compensation employer immunity expressly does *not* extend to intentional acts.<sup>90</sup> The Louisiana Supreme Court has interpreted intentional act to mean intentional tort.<sup>91</sup> Indeed, the vast majority of meaningful intentional torts cases in Louisiana now arise in the workplace context.<sup>92</sup>

If an employer is held liable for both compensation benefits and tort damages, the employer, as tortfeasor, gets a credit for compensation benefits paid so as to avoid double recovery.<sup>93</sup> But, assuming Benoit cannot prove an intentional tort *and* his injury is covered by worker's compensation, then he will not be able to recover any tort damages from his employer, M&M.<sup>94</sup>

## 2. *Benoit and M&M v. Hunt: Where Guillory Is Not a Borrowed Servant—The Third Party Tort Suit*

Benoit will most likely only recover worker's compensation benefits from M&M; but, what rights would he have against Hunt? Assuming Guillory was not a borrowed servant of M&M and Hunt was vicariously liable for Guillory's torts, Benoit would have a tort claim against Hunt pursuant to Article 2320. Here, Benoit

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89. *Id.* at 1372 n.17.

90. La. R.S. 23:1032 (Supp. 1994).

91. *See id.*; *Caudle v. Betts*, 512 So. 2d 389 (La. 1987); *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

92. *Caudle v. Betts*, 512 So. 2d 389 (La. 1987); *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

93. *See Gagnard v. Baldrige*, 612 So. 2d 732 (La. 1993).

94. As to the death of the dual capacity doctrine in Louisiana, see La. R.S. 23:1032 (Supp. 1994). For its short life, see *Ducote v. Albert*, 521 So. 2d 399 (La. 1988). *See also Nunez v. Canik*, 551 So. 2d 796 (La. App. 3d Cir. 1989), *writ denied*, 556 So. 2d 57 (1990); *Deagracias v. Chandler*, 551 So. 2d 25 (La. App. 4th Cir. 1989); *White v. Naquin*, 500 So. 2d 436 (La. App. 1st Cir. 1986). However, recently in *Wright v. State*, 639 So. 2d 258 (La. 1994), a security officer at a state hospital was injured on the job. He had surgery to repair his injuries at the hospital where he worked. Thereafter, he sued the hospital and various health care providers for negligence. The court allowed the tort suit to go forward. Neither the hospital defendant nor the health care provider defendants were acting simultaneously in a dual capacity at the time of the alleged tort; thus, the dual capacity doctrine was inapposite. Moreover, at the relevant time, the plaintiff was not being treated pursuant to a benefit or requirement of his employment.

would be no different from Hector. The worker's compensation statute does not effect an employee's tort suits against most third parties.<sup>95</sup> Additionally, M&M (or its compensation carrier) would have a claim against Hunt for any worker's compensation benefits which M&M had paid to Benoit.<sup>96</sup> In this regard, the Louisiana Supreme Court's decision in *Gauthier v. O'Brien*<sup>97</sup> is most relevant.

In *Gauthier*, the supreme court held that, in a third party tort suit, the fact finder must allocate fault not only to the injured party (parties), but also to Benoit's immune employer, M&M.<sup>98</sup> Thereafter, the judge may reallocate the employer's fault among the other blameworthy parties in the suit in proportion to each party's fault. Thus, the employer's fault will not directly reduce its recovery, or the intervenor's recovery, of workers compensation benefits except to the extent employer fault was (partially) reallocated to the employee. The employer's (or intervenor's) recovery of benefits paid is reduced by the employee's fault, both actual and reallocated.<sup>99</sup>

One should also note that M&M, the employer/intervenor, would get a credit against its future worker's compensation liability to Benoit equal to the tort judgment exceeding the amount of compensation already paid, less the cost of recovery of compensation benefits.<sup>100</sup> The extent to which the intervenor, M&M, is required to contribute to the cost of recovering compensation paid is limited by statute to one-third of the amount of the compensation recovery.<sup>101</sup> Likewise, pursuant to the 1989 amendment to the applicable statute,<sup>102</sup> the employer's (intervenor's) credit against future compensation liability runs against the entire judgment amount, not merely that portion of the judgment awarding damages for medical expenses and lost wages.<sup>103</sup> The Louisiana Supreme Court has held that the 1989 amendment to the applicable statute is substantive and will not be retroactively applied.<sup>104</sup>

### 3. *Hunt v. M&M—No Contribution*

If Benoit sued Hunt, Hunt would not have a claim for contribution against M&M for any tort damage it would have had to pay Benoit.<sup>105</sup> Courts have reasoned that allowing contribution would effectively make the employer

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95. La. R.S. 23:1101 (Supp. 1994).

96. See La. R.S. 23:1101-1103 (Supp. 1994).

97. 618 So. 2d 825 (La. 1993).

98. *Id.* at 828-29.

99. *Id.* at 828-32.

100. La. R.S. 23:1103(A)(1) (Supp. 1994).

101. La. R.S. 23:1103(C) (Supp. 1994).

102. La. R.S. 23:1103(A)(1) (Supp. 1994).

103. In this regard, the 1989 amendment to La. R.S. 23:1103 overruled *Brooks v. Chicola*, 514 So. 2d 7 (La. 1987) and *Fontenot v. Hanover Insurance Co.*, 385 So. 2d 238 (La. 1980).

104. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809 (La. 1992).

105. *Franklin v. Oilfield Heavy Haulers*, 478 So. 2d 549 (La. App. 3d Cir. 1985), *writ denied*, 481 So. 2d 1330 (1986).

indirectly liable in tort to the employee.<sup>106</sup> Reasoning this indirect liability would be inconsistent with the employer's immunity, courts have denied the third party's contribution claim against the employer. *Gauthier* does not change this result.

4. *Benoit and M&M v. Hunt: Where Guillory Is a Borrowed Servant*

a. *The One Master Rule*

Thus far, I have analyzed what rights Benoit and M&M would have against Hunt if Guillory was *not* a borrowed servant; what if Guillory was a borrowed servant? Under the pre-*LeJeune* jurisprudence, where an employee could have only one master at a time, if Guillory was a borrowed servant of M&M, then Benoit would have no claim for vicarious liability against Hunt since Guillory's relationship with Hunt would have been suspended by the borrowing. Accordingly, M&M would not be able to recover any compensation paid to Benoit from Hunt.

b. *The Two Masters Rule*

But, according to *LeJeune* and *Blair*, an employee can have two masters. If so, Guillory would, even though borrowed by M&M, still have been Hunt's employee and engaged in the course and scope of Hunt's employment. Then, Hunt would still be vicariously liable for Guillory's tort and Benoit would be able to recover in tort from Hunt. In fact, that was precisely the holding in *LeJeune* where the plaintiffs were the wrongful death beneficiaries of the employee of the special employer and they recovered from the general employer.

If Benoit could recover from Hunt, what rights would M&M have against Hunt to recover worker's compensation benefits it paid to Benoit? M&M could recover the compensation it paid, subject to *Gauthier*. The most sensible thing for employers to do in such situations would be to contractually provide for worker's compensation liability between themselves beforehand.

5. *Benoit and M&M v. Guillory*

a. *No Borrowed Servant*

What rights would Benoit have against Guillory in this version of the hypothetical? If Guillory was *not* a borrowed servant of M&M (and if M&M was not Guillory's statutory employer) and if Guillory personally owed a duty to Benoit to weld carefully (i.e., not to injure him while welding), then Benoit should be able to recover from Guillory in tort. Likewise, M&M would have

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106. *Id.* at 557.

rights against Guillory to recover any compensation it paid to Benoit. Practically, both these rights are hollow because Hunt probably is the defendant from whom Benoit and M&M really want to recover. However, to the extent Guillory has some type of liability insurance coverage or may be a named insured on a Hunt liability insurance policy, Guillory's liability would not be of merely academic concern.

*b. Borrowed Servant: Tort or Co-Employees?*

Alternatively, if Guillory was a borrowed servant of M&M, could Benoit recover from Guillory in tort? Or, is Benoit's action barred because he and Guillory are co-employees? If they are co-employees, Benoit cannot recover from Guillory.<sup>107</sup> This is because the worker's compensation immunity extends not only to the employer, but also to co-employees, among others.<sup>108</sup> In this precise setting, Malone and Johnson have argued that, if Hunt can be vicariously liable for Guillory's tort, even if Guillory is a borrowed servant, then Benoit must also be able to recover from Guillory in tort.<sup>109</sup>

Malone and Johnson reason backwards from the result in *LeJeune* to justify their conclusion that Guillory is liable to Benoit in tort. *LeJeune* holds that the general employer is vicariously liable under the two master rule for the borrowed servant's torts that injure the special employer's employees. If the general employer is vicariously liable, then the basis of that vicarious liability is the borrowed servant's tort. It is the borrowed servant's tort which goes upstream to the general employer. Thus, there must be a tort (liability) to pass upstream. That tort, Guillory's tort, is the basis for Hunt's vicarious liability and the basis for Malone and Johnson's conclusion that Guillory is liable to Benoit.

Under their reasoning, if Benoit's action against Guillory was barred because they were co-employees, how could Hunt ever be vicariously liable for Guillory's tort? That is, if Guillory was immune from Benoit's tort suit, what possible liability could there be to pass upstream to Hunt?

While Malone and Johnson's reasoning is persuasive, let us momentarily revisit Louisiana Revised Statutes 9:3921. Under that statute it appears that an employer remains vicariously liable for the torts of his employee, even after the plaintiff has settled with that same employee.<sup>110</sup> That result reveals a legislative perception that the enterprise (employer) remains liable even when the employee is not. Here we are dealing with a different, but related matter. Can the employer be liable where the employee is personally immune? If holding the general employer liable is consistent with applicable social policies concerning

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107. See La. R.S. 23:1032 (Supp. 1994).

108. *Id.*

109. See Wex S. Malone & H. Alston Johnson, III, *Workers' Compensation Law and Practice* § 368, at 177-78 n.55, in 14 *Louisiana Civil Law Treatise* (2d ed. 1980).

110. See *supra* notes 35-37 and accompanying text.

enterprise liability, then why not? In the family situation, we hold a liability insurer liable even though the insured spouse (or parent) is immune.<sup>111</sup>

But, assuming the flexibility to hold the employer, but not the employee, liable, is that a sound result here? Do we want to grant Guillory immunity from Benoit's suit? They are working together, side-by-side, under M&M's control, doing M&M's business. If Guillory was a payroll employee of M&M, rather than a borrowed servant, doing the same work he did as a borrowed servant, he would be immune as a co-employee. Moreover, as will be seen below, if Benoit injured Guillory, the borrowed servant, Benoit would be immune from Guillory's tort suit. Where does it leave us? It leaves me thinking Guillory should be immune from Benoit's tort suit; although, I admit my feelings are based as much on my own notions of fairness and equity as on analytical methods and reasoned elaboration. It also leaves me wondering just why Benoit gets tort recovery from Hunt at all. I believe it has more to do with a desire to compensate and a judicial notion that worker's compensation is inadequate to that end than with logical determinism.

*c. Enter The Statutory Employer Doctrine*

A related question is: what if M&M was Guillory's statutory employer? How does that affect things? The statutory employer doctrine is an important issue in Louisiana workplace tort cases. There are two ways for M&M to become Guillory's statutory employer: (1) under the two contract doctrine, and (2) if the work which Guillory was retained to perform was within M&M's trade, business, or occupation.<sup>112</sup> I will not extensively deal with either of those because so much has recently been written about the statutory employer doctrine, and it is in such a state of flux that what I say may be dated (wrong) before this is published. But now would be an opportune time to point out some distinctions between the statutory employer doctrine and the borrowed servant doctrine.

The borrowed servant doctrine does three things. First, it makes the special employer vicariously liable for the torts of the borrowed servant. Second, it makes the special employer liable for worker's compensation benefits to the borrowed servant. And, third, it gives the special employer tort immunity from the borrowed servant's tort suits. Alternatively, the statutory employer doctrine only does two things: first, it makes the statutory employer liable for worker's compensation benefits to the statutory employee; and, second, it gives the statutory employer tort immunity from the statutory employee's non-intentional tort suits, whether the statutory employer has paid workers compensation benefits or not. That is, the second and third things that the borrowed servant doctrine does are the only two things that the statutory employer doctrine does. The statutory employer doctrine does not do the first thing that the borrowed servant

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111. See *supra* notes 43-45 and accompanying text.

112. La. R.S. 23:1032 (Supp. 1994) and 23:1061 (Supp. 1994).

doctrine does. It does not make the statutory employer vicariously liable for the torts of the statutory employee. That is why we were not concerned with it when Hector was hurt. If M&M was Guillory's statutory employer, then Guillory, if injured, would be entitled to recover worker's compensation from M&M and M&M would be immune from Guillory's tort suit.

Returning to the basic question, what if M&M was Guillory's statutory employer? What effect would that have on liability here? If M&M was Guillory's statutory employer, could Benoit recover in tort from Guillory? The Louisiana Supreme Court has held he could.<sup>113</sup> This is somewhat inconsistent with my conclusion in the borrowed servant setting. Likewise, if M&M was Guillory's statutory employer, Benoit would be able to recover from Hunt.<sup>114</sup> Furthermore, M&M or Benoit would be able to recover from Hunt's insurer. Thus, the co-employee tort immunity would not extend to protect Guillory, or Hunt, from tort liability if M&M was Guillory's statutory employer and Guillory injured Benoit.

### C. *Guillory v. The World*

#### 1. *No Borrowed Servants*

What if Guillory was injured as a result of Benoit's negligence, not his own, on the M&M job? If Guillory was *not* M&M's borrowed servant and M&M was *not* Guillory's statutory employer, Guillory would recover worker's compensation benefits from Hunt, his employer. Guillory would also be entitled to tort damages from Benoit and M&M. Hunt would be able to recover its compensation paid from Benoit and/or M&M.

#### 2. *Guillory Is a Borrowed Servant*

If Guillory was a borrowed servant of M&M under the old one master rule, his employment with Hunt would be suspended so he would get nothing from Hunt. However, he would be entitled to worker's compensation from M&M. Guillory would be a co-employee of Benoit and presumably Benoit would have no tort claim against him.

If Guillory was a borrowed servant of M&M, under the two master rule, Guillory could presumably recover worker's compensation from either Hunt or M&M. But, he would have no tort claim against anyone. M&M, Benoit, and Hunt would all be immune. Note the inconsistency here. When Guillory, the borrowed servant, hurt Benoit, the special employer's payroll employee, Benoit recovered in tort from Hunt and, according to Malone and Johnson, from

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113. *Johnson v. Alexander*, 419 So. 2d 451 (La. 1982).

114. *Id.* at 454.

Guillory as well. When Benoit hurts Guillory, and Guillory is borrowed, Guillory only recovers compensation.<sup>115</sup>

### 3. *Where M&M Is Guillory's Statutory Employer*

If M&M is Guillory's statutory employer, Guillory could recover compensation from Hunt or M&M. But again, Guillory has no tort claim against anyone. Again note the inconsistency. Benoit recovered in tort from Guillory and Hunt when M&M was Guillory's statutory employer and Guillory hurt him. However, Guillory gets nothing but compensation benefits.

### 4. *Guillory and Benoit Injure One Another: Logical Irony*

Let us assume Guillory is injured as a result of his own negligence in welding as well as Benoit's negligence. They negligently hurt each other. What rights does each have? If Guillory is *not* a borrowed servant and M&M is *not* his statutory employer, Guillory would recover worker's compensation from Hunt and tort, reduced by his fault, from M&M and Benoit. Hunt would recover the compensation it paid Guillory from M&M and Benoit, reduced by Guillory's fault. Benoit would recover compensation from M&M and tort, reduced by his fault, from Hunt and Guillory. M&M would recover the compensation it paid Benoit from Hunt and Guillory, reduced by Benoit's fault.

What if Guillory was a borrowed servant? Assuming that one can have two masters, then, whether Guillory is borrowed or not, he will only be entitled to worker's compensation from Hunt. What about Guillory's action against M&M? If Guillory is a borrowed servant, then he is only entitled to compensation benefits, at most, from M&M. Guillory would recover nothing from his "co-employee" Benoit. Alternatively, Benoit would recover compensation from M&M and tort, reduced by his fault, from Hunt and Guillory. M&M would recover the compensation it paid Benoit from Hunt and Guillory, reduced by Benoit's fault. Note the now glaring inconsistency. The borrowed servant and the special employer's payroll employee hurt each other. The borrowed servant, Guillory, gets nothing but compensation benefits. The special employer's payroll employee, Benoit, gets compensation benefits and tort damages.

The result is just as beastly if M&M is Guillory's statutory employer and Guillory and Benoit hurt one another. Guillory gets compensation from either Hunt or M&M, the statutory employer. He gets nothing from Benoit. Benoit gets compensation benefits from M&M *and* tort damages, reduced by his fault, from Hunt and Guillory. M&M recovers the compensation it paid Benoit, reduced by Benoit's fault, from Hunt and Guillory.

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115. One should also note, that if M&M and Hunt were joint employers of Guillory, Guillory would be entitled to worker's compensation benefits from either one of them, but not tort. See La. R.S. 23:1031 (Supp. 1994).

These results are driven by the fictions of who is working for whom rather than the realities of the situation. What solution is there? Malone and Johnson would apparently leave both Benoit and Guillory to their worker's compensation rights with no tort recovery at all.<sup>116</sup> Although this would lead to some symmetry, it would deprive Benoit of valuable tort rights which he now has. Perhaps these unfair results are merely the inevitable consequence of the overlap of two systems: a worker's compensation system based on no-fault and a fault-based system. Alternatively, no doubt, the perception that the worker's compensation system is under-compensatory leads compassionate judges to find ways to give workers access to the more lucrative tort system. In this unhappy world, the logic of the legal system we have adopted allows courts to only free the special employer's employee of the limits of the worker's compensation system. Maybe half a loaf is better than nothing, but here it all seems so inequitable. Two workers, side-by-side, get hurt. One recovers tort damages and compensation benefits, the other one recovers only compensation benefits; and it's all driven by who they work for and related, fictitious, legal concepts.

### III. CONCLUSION

It has not been my mission to present any grand theories or to suggest proper results in these classes of cases. Rather, I have tried to set forth some typical workplace tort issues and how courts have dealt with them. Here, as in other areas of the law, the student must keep in mind who is suing whom for what and the multifarious relationships between the parties. This is because it is the legal characterization of those relationships, rather than equity, fairness, or function, that often dictates the result in a particular case.

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116. See La. R.S. 23:1032 (Supp. 1994).



